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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STACY CAMBARA, Plaintiff and Respondent, v. JOHN PAUL GALLO, Appellant.	B282440 (Los Angeles County Super. Ct. No. BQ044664)

APPEAL from an order of the Superior Court of Los Angeles County, Amy M. Pellman, Judge. Affirmed.

Law Office of Corey Evan Parker and Corey Evan Parker for Appellant.

Espinosa and Espinosa, Daniel R. Espinosa and Cynthia Farias for Plaintiff and Respondent.

INTRODUCTION

Respondent Stacy Cambara sought a domestic violence restraining order (DVRO) against her former boyfriend, appellant John Gallo. The court granted a five-year restraining order. Two and a half years later, Gallo filed a request to vacate the restraining order, arguing that Cambara's underlying allegations were false. He also contended that he was never properly served with notice of the hearing on the restraining order, as his criminal counsel rejected attempted service on Gallo, and therefore Gallo never saw the papers or knew their contents. The court denied Gallo's request to vacate.

As he did below, Gallo argues on appeal that he was not properly served with notice of the DVRO hearing, any negligence by his attorney should not be imputed to him, and the trial court erred in rejecting his declaration disputing Cambara's version of events. We find no error and affirm.

FACTUAL AND PROCEDURAL HISTORY

Cambara filed an ex parte request for a DVRO on June 4, 2014. She alleged several incidents of domestic violence against her by Gallo in 2013. She also alleged that in May 2014, after Gallo discovered Cambara had submitted a declaration in support of another woman seeking a restraining order, he called her "to intimidate" her; Gallo also purportedly told Cambara he was going to make her regret talking. She included a declaration of ex parte notice with her request, stating that she did not give notice to Gallo because she was afraid that the violence would reoccur and she was trying to avoid contact with him.

On June 25, 2014, the court denied the request for a temporary DVRO but continued the hearing on the restraining order to July 17, 2014. Cambara filed a supplemental declaration

on July 16, 2014, providing additional details regarding her relationship with Gallo and her allegations of abuse.

Cambara also filed a proof of personal service on July 17, 2014. Therein, detective Michael Mazzacano declared that he personally served Gallo on July 7, 2014 with the notice of new hearing date and order on reissuance at the office of Gallo's attorney, Michael Kraut. Mazzacano also wrote the following onto the form: "Given in person to Gallo – M Kraut – took and gave back to me." The word "(lawyer)" was also written above Kraut's name.

The court held a hearing on the DVRO on July 17, 2014. Cambara appeared in propria persona. Gallo did not appear. The court granted Cambara's request and issued a restraining order for a term of five years, expiring on July 17, 2019. The court expressly found that proof of service of the notice of hearing was presented to the court. The court further ordered Cambara to have a copy of the DVRO personally served on Gallo. Gallo was personally served with the DVRO on August 2, 2016.

In February 2017, through counsel Rita Azizi, Gallo filed a request for order to set aside, terminate, or vacate the DVRO under Family Code section 6345. Gallo asserted that he was not served with the notice of hearing and was therefore "deprived of his right to appear at the hearing and cross examine the accuser." He also contended that Cambara presented no evidence in support of her allegations. He also moved for relief pursuant to Code of Civil Procedure section 473, subdivisions (b) and (d),[1] arguing that he "was never informed" of the hearing and, alternatively, that he "should not be imputed with the mistake of

[1]All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

his former counsel" Kraut, who took the service papers and "threw them back at" the person attempting service.

Gallo filed a supporting declaration, stating that he was unaware of the restraining order and unaware there had been a hearing until informed by his attorney, Azizi, in February 2017. He detailed his relationship with Cambara, which he claimed was "casual" and asserted that Cambara and another woman he was dating found out about each other and decided to "punish" him by fabricating allegations of abuse. He also denied all of the substantive allegations and claimed that the district attorney had declined to press any criminal charges against him. Gallo attached as exhibits to his declaration a series of emails from Cambara from 2012, as well as a text message that he claimed was also from Cambara, although the message itself did not identify the sender or the year it was sent.[2]

According to Gallo, at the time of the attempted service of the notice of hearing in 2014, he was sitting with Kraut, who was representing him in connection with a criminal investigation into Cambara's allegations. Gallo was giving a statement to detective Mazzacano regarding the investigation. Afterward, Mazzacano "handed [Kraut] some documents. My attorney shouted some

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[2]In his moving papers before the trial court, Gallo suggested that the text message was among the "typical" affectionate messages Cambara continued to send Gallo after the entry of the DVRO. In the text message, bearing the date Friday, August 23, the sender states that he or she "had a dream about" the recipient. After Cambara pointed out in her opposition that August 23 did not fall on a Friday in 2014, 2015, or 2016 (the three years following entry of the DVRO), Gallo replied that he "never claimed" the text was sent in 2014, rather, it was sent in 2013.

obscenities at the detective, threw the papers back at the detective, and I did not have an opportunity to even see the papers." Gallo further declared that he asked Kraut about the papers and Kraut responded, "Don't worry about it," and claimed the detective "had not followed protocol." Gallo claimed he was "confused, but deferred to my attorney."

Cambara, represented by counsel, filed an opposition to Gallo's request to vacate or terminate the DVRO. She argued that Gallo's moving papers failed to provide sufficient grounds for relief under section 473 and did not include any affidavit of fault from Kraut. She also argued that Gallo was properly served.

In her accompanying declaration, Cambara stated that Gallo was served with the notice of DVRO hearing by Mazzacano on July 7, 2014, and the proof of service was filed on the day of the hearing. She contended that after the DVRO was issued, she asked the police for assistance in locating Gallo in order to serve him, because she did not know his current address. She ultimately found "through court documents" that he would be appearing at a deposition in an unrelated civil matter and was able to serve him there using a process server in August 2016. Cambara reiterated that she continued to be afraid of Gallo.

Gallo filed a reply, including declarations from Gallo and Kraut and attaching a copy of the proof of service by Mazzacano. In his declaration, Kraut stated that he was representing Gallo during the interview with Mazzacano in July 2014. At the end of the interview, Mazzacano "attempted to hand [Gallo] some documents. Neither John nor I had an opportunity to review the documents. I became upset and told Mr. Mazzacano, that my office is not a place to be served with any documents." Mazzacano then left the office.

The court held a hearing on Gallo's request on March 10, 2017. Under section 533,[3] the court found first that Gallo failed to show any material change in the facts upon which the restraining order was granted. The court found Gallo failed to provide evidence to support his contention that Cambara's allegations were false, "other than his own declaration denying the facts upon which the order was based." Second, Gallo failed to show any change in the law as a basis to set aside the restraining order. Lastly, the court rejected as "disingenuous" Gallo's argument that the order should be set aside in order to serve the ends of justice because he was never given notice of the hearing or an opportunity to appear. The court continued, "The proof of service filed with the court on 7/17/14, establishes that the detective Michael Mazzacano personally gave copies of the notice of the new hearing date and order on re-issuance to respondent. The proof of service alleges that respondent's attorney Mr. Kraut took the papers and gave them back to the detective." The court concluded that Gallo "was personally served with a notice of the hearing for the restraining order. The fact that his attorney took the papers and handed them back to the detective serving them, per the attorney's declaration in the

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[3]Section 533 allows a court to modify or dissolve "'an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order.'" This standard applies to a motion to terminate a DVRO. (See *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1504 (*Loeffler).*)

reply, without first making any effort to determine the nature of the papers, constitutes avoidance and inexcusable negligent [*sic*]."

The court also examined Gallo's request for relief under section 473.5, concluding, "[b]ased upon respondent counsel's act of taking the papers and then returning them to the detective, this court finds that any lack of due process was based upon the actions of respondent and his attorney and on that basis respondent failed to meet his burden to establish that termination or modification of the order is warranted." Gallo's counsel argued that Gallo should not be punished for relying on his attorney's guidance. The court responded, "[Gallo] is an adult, and I'm assuming a very intelligent adult, and when somebody hands you papers that are legal papers, generally, you look at them. If you don't and your attorney snatches them away from you, you either ask to see them, or you're trusting your attorney. And if your attorney did something wrong – which it appears he did – then really your beef is with your attorney, not with the restraining order. That was done properly." Accordingly, the court denied Gallo's request.

Gallo timely appealed.[4]

DISCUSSION

Gallo contends that the trial court should have vacated or terminated the restraining order under either Family Code section 6345 or section 473, subdivisions (b) and (d). We examine each argument in turn.

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[4]The trial court's order is appealable pursuant to section 904.1, subdivision (a)(6), which permits an immediate appeal from "an order . . . refusing to grant or dissolve an injunction." (*Loeffler, supra*, 174 Cal.App.4th at p. 1502, fn.9.)

I. *Denial of Relief Pursuant to Family Code Section 6345*

A. *Legal standards*

Pursuant to Family Code section 6345, subdivision (a), the trial court has the discretion to terminate or modify a DVRO upon motion of a party. As we noted above, the standard on a motion to terminate a DVRO is set forth in section 533: the moving party must show there has been a material change in the facts or law upon which the restraining order was granted, or that the ends of justice would be served by the DVRO's termination. (See *Loeffler, supra,* 174 Cal.App.4th at p. 1504.)

"As in any review of an order denying a motion to dissolve an injunction, we apply an abuse of discretion standard of review." (*Loeffler, supra,* 174 Cal.App.4th at p. 1505, citing *Salazar v. Eastin* (1995) 9 Cal.4th 836, 850 [an order ""refusing to dissolve a permanent or preliminary injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case"' and 'will not be modified or dissolved on appeal except for an abuse of discretion"'].) We review any factual findings made by the trial court for substantial evidence. (*Loeffler, supra,* 174 Cal.App.4th at p. 1505; *Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822.) Accordingly, "[w]e resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value." (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762, citing *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

B. *Analysis*

Gallo contends that he established a material change in facts warranted terminating the DVRO or, alternatively, that terminating the DVRO would serve the ends of justice as he was unable to appear or present evidence at the prior hearing. The trial court rejected these contentions; we find it did not abuse its discretion in doing so.

First, Gallo argues that his declaration supporting his request to terminate the DVRO, in which he disputed Cambara's allegations of domestic violence, constitutes a material change in the facts compelling the trial court to find in his favor. The only case he cites in support of this argument, *Rosenthal v. Garner* (1983) 142 Cal.App.3d 891, 895 (*Rosenthal*), is inapposite. There, the plaintiffs opposed the defendant's motion for relief from default under section 473.5, arguing that the defendant had not established "the existence of a meritorious defense were the case to be tried." The court disagreed and found the defendant's submission of a proposed verified answer "was a sufficient showing of merits to justify relief from default." (*Id*. at p. 898.) The court did not consider whether there was a material change in facts sufficient to modify or terminate a restraining order under section 533.

At the DVRO hearing, Cambara presented her declaration as evidence in support of her allegations of domestic violence and her claim that a restraining order was necessary to protect her from retaliation by Gallo. In his request for termination of the DVRO, Gallo presented his own declaration, denying Cambara's allegations, claiming she had ulterior motives for seeking the DVRO, and arguing that Cambara lacked any corroboration for her claims. As the trier of fact, the court was entitled to credit

Cambara's evidence and reject Gallo's. We do not reweigh the evidence on appeal, and we give deference to the trial court's findings. (See, e.g., *Scott v. Pacific Gas & Electric Co*. (1995) 11 Cal.4th 454, 465.) Moreover, substantial evidence supported the trial court's determination that the evidence presented by Gallo was insufficient to meet his burden to show a material change in the facts on which the DVRO was based. In particular, we note that the court found some of Gallo's claims "disingenuous" and rejected other evidence (such as the text message) as unfounded.

Second, Gallo asserts that the court erred in finding that he was properly served as the basis for concluding that the ends of justice did not require termination of the DVRO. He contends that the record is insufficient to establish that he was personally served by Mazzacano, and that no service could be effected upon Kraut, who was not his attorney on this matter.

The trial court found Gallo was personally served by Mazzacano. Substantial evidence supports this conclusion. On its face, the proof of service states as much, specifically, that Mazzacano gave the papers to Gallo. Gallo claims the proof of service is unclear as to whether Mazzacano gave the documents to Gallo or to Kraut; he also queries whether, once Kraut rejected the documents, "did Mazzacano then attempt to serve Mr. Gallo?" This purported confusion ignores Kraut's declaration, in which he states that Mazzacano first "attempted" to hand the documents to Gallo, then Kraut interceded and gave the documents back to the detective. Taken together, this evidence was sufficient to conclude that Mazzacano gave the documents to Gallo in the first instance.

Personal service is deemed complete at the time of delivery. (§ 415.10; see also *Board of Trustees of Leland Stanford Junior*

University v. Ham (2013) 216 Cal.App.4th 330, 336–337.) Thus, once Mazzacano handed the notice of hearing to Gallo, service was complete. The fact that Gallo and Kraut subsequently refused to keep the documents does not invalidate the service. Gallo suggests as much, but offers no authority to support this proposition.[5] Nor does he cite anything to support his argument that Mazzacano somehow agreed that service was improper by taking the documents back. We find no basis to reach such conclusion; rather, the evidence suggests Kraut swore or yelled at Mazzacano and insisted on returning the documents. Mazzacano then completed the proof of service indicating that he *did* complete personal service.

Thus, because we conclude that there was substantial evidence to support the trial court's finding of personal service on Gallo, we need not reach the alternative argument regarding the propriety of any attempted service on Kraut.

Gallo also argues that it would be unjust to let these results stand, as neither he nor Kraut had the opportunity to view the documents before they were returned to Mazzacano. He therefore asserts that he did not know they provided notice of a

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[5]We are not persuaded otherwise by the language in *Sorrell v. Superior Court in and for Los Angeles County* (1946) 73 Cal.App.2d 194, 201, stating that "[w]hen process, consisting of summons and complaint or a restraining order, is personally handed to and left with a defendant, valid service has been made." The issue there was whether there was evidence of any personal service at all, and the court did not examine circumstances similar to those in this case. Further, the case predates section 415.10 and thus did not address that authority.

DVRO hearing, or indeed that they were legal documents at all. The trial court found otherwise. Notably, the court rejected Gallo's suggestion that he had no opportunity to review the documents, finding that Gallo had the opportunity either to ask to see the documents he had just been handed, or to trust Kraut's assertion that he did not need to worry about them. Gallo's decision not to read the documents does not amount to a lack of that opportunity in the first place. It was not an abuse of discretion for the court to conclude that the ends of justice did not require relief from the DVRO under these circumstances.

II. *Denial of Relief Pursuant to Section 473*

A. *The order was not void under section 473, subsection (d)*

Section 473, subdivision (d) provides that a court "may, on motion of either party after notice to the other party, set aside any void judgment or order." Under this section, the court may set aside a judgment or order as "void, as a matter of law, due to improper service." (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200 (*Hearn*).) We review de novo the legal determination of whether the judgement or order was void for invalid service of process. (*Ibid*.)

Gallo asserts that the DVRO is void for invalid service of the notice of hearing. He brought his request to terminate or vacate the DVRO more than two years after it was entered. After six months have elapsed since the entry of a judgment or order, "a trial court may grant a motion to set aside that judgment as void only if the judgment is void on its face." (*Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1441.) "'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll.'

[Citation.] In a case in which the defendant does not answer the complaint, the judgment roll includes the proof of service. [Citation.]" (*Ibid.*)

As we discussed in section I above, the proof of service demonstrates proper personal service of the notice of hearing on Gallo. As such, we cannot conclude that the DVRO is void on its face.

B. *Conduct by Gallo and Kraut bars relief pursuant to section 473, subsection (b)*

Under section 473, subdivision (b), "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." We review a trial court's denial of relief under this section for abuse of discretion. (See *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.)

As an initial matter, we note that although Gallo moved for relief pursuant to section 473, the trial court cited section 473.5 in concluding that Gallo failed to establish that termination or modification of the DVRO was warranted. Section 473.5 applies to motions to set aside a default or default judgment, while section 473 applies to relief from a judgment or order. Here, there is nothing in the record reflecting entry of default or default judgment. Moreover, a motion for relief under section 473.5 must be made no later than two years after entry of judgment. (§ 473.5, subd. (a).) Thus, section 473.5 is inapplicable. Regardless, "[w]e do not review the trial court's reasoning, but rather its ruling. A trial court's order is affirmed if correct on any theory, even if the trial court's reasoning was not correct." (*J.B.*

Aguerre, Inc. v. American Guarantee & Liability Ins. Co. (1997) 59 Cal.App.4th 6, 15.)

Moreover, to the extent the trial court erred in applying the wrong standard, that error is harmless because section 473, subdivision (b) and section 473.5 require a similar showing. Thus, the court's finding of inexcusable neglect would prevent relief under either section 473 or 473.5. (See §§ 473, subd. (b), 473.5, subd. (b).)

Turning to the substance of Gallo's claim, he argues that the trial court erred in failing to apply the so-called "*Daley* exception." As explained by the court in *Rosenthal, supra,* 142 Cal.App.3d at pp. 896-897: "'In general, a party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable "because the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief." [Citation.] The client's redress for inexcusable neglect by counsel is, of course, an action for malpractice. [Citations.]'" "'However, an exception to this general rule has developed . . . [, in] "instances where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. [Citations.] The exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship, and for this reason his negligence should not be imputed to the client." [Citations.]'" (*Id*. at p. 897; see also *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391 (*Daley*) [discussing "exceptional cases in which the client, relatively free from personal neglect, will be

relieved of a default or dismissal attributable to the inaction or procrastination of his counsel"].)

Here, while the court did not explicitly address this exception, it did find that any lack of notice was "based upon the actions of [Gallo] and his attorney." We find substantial evidence in the record to support a conclusion that Gallo is not "relatively free from negligence," and thus that the *Daley* exception is inapplicable. Notably, the cases applying this exception cited by Gallo involve attorney action with no knowledge by the client. In *Rosenthal*, for example, the court set aside a default judgment where the attorney received a summons and complaint and failed to advise the client. (*Rosenthal, supra,* 142 Cal.App.3d at p. 897; see also *Fleming v. Gallegos* (1994) 23 Cal.App.4th 68, 73 ["The *Daley* exception pertains where an attorney abandons the client through a total failure to represent that client."]; *Daley, supra*, 227 Cal.App.2d at p.392 [finding client was "unknowingly deprived of effective representation" based on counsel's failure to take any steps to prosecute the case].)

Here, on the other hand, Gallo was present with his attorney when Mazzarano handed him papers. Based on that interaction, as well as Kraut's vocal objection to the service, the record supports the conclusion that Gallo was on notice that he was being served with legal papers. His decision to follow his attorney's lead and remain willfully blind as to the contents of the documents does not render him relatively free from negligence. As such, any inexcusable negligence by Kraut in returning the documents to Mazzarano and failing to investigate further is fairly imputed to Gallo and the court did not abuse its discretion in refusing relief under section 473, subdivision (b).

DISPOSITION

The trial court's order is affirmed. Respondent is awarded her costs on appeal.

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COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.